IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1314

M. PERRY GRANT and SERVICE SECURITIES, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MARK HURWITZ,
100 West Chapman Avenue,
Orange, Calif. 92666,
Attorney for Petitioners.

Of Counsel:
HURWITZ & HURWITZ.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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M. PERRY GRANT and SERVICE SECURITIES, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The Petitioners, M. Perry Grant and Service Securities, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 25, 1972.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. WHETHER UNDER THE NEW YORK CRIMINAL PROCEDURE LAW § 700 ET SEQ. THE WARRANT WAS PROPERLY ISSUED AND EXTENDED FOR SEVERAL MONTHS.

2. WHETHER THE WARRANT APPLIED TO OFFENSES OUTSIDE THE SCOPE OF THIS PROSECUTION AND WAS INVALID FOR ANY PURPOSE AS AGAINST GRANT.

3. WHETHER A WIRETAP WARRANT CAN BE USED TO COLLECT A CONVERSATION ADMITTED AGAINST A PARTY NOT NAMED OR INTENDED TO BE COVERED BY THE WARRANT AND UPON WHOM THE WARRANT WAS NEVER SERVED IN VIOLATION OF THE NEW YORK CRIMINAL PROCEDURE LAW § 700.50.

4. WHETHER THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT AND EXTENSIONS THERETO AND THUS INVALID UNDER THE FOURTH AMENDMENT.

Constitutional Provision Involved.

United States Constitution, Amendment IV, V and XIV.

Statutes Involved.

New York Code of Criminal Procedure Section 700 *et seq.;* Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Sections 2510 *et seq.*).

Statement of the Case.

Petitioners were convicted after a jury trial in the District Court for the Southern District of New York, finding Petitioners guilty of violating the anti-fraud

provisions of the Federal Securities Law, 15 U.S.C. Section 77q(a), 77x, 78j(b), and 78ff(1970), of violating the mail fraud statute, 18 U.S.C. Section 1341 (1970), and of conspiring to violate the mail fraud statute and the anti-fraud provisions of the securities laws, 18 U.S.C. Section 371 (1970). On the five counts upon which they were convicted (the Data offering) the trial judge sentenced Grant to concurrent terms of imprisonment of six months on each count and fined Service $1.00 on each count.

On appeal to the Court of Appeals for the Second Circuit, Petitioners contended that the indictment was tainted by unlawful wiretapping. That Court, concluding that the wiretaps were legal, did not reach the taint question (Op. 3260) although it noted that "on several occasions . . . conversations between Grant and others relating to the data offering were intercepted and recorded" (Op. 3261). Petitioners were not named in the wiretapping orders, nor was Petitioner Grant notified that his conversations had been intercepted.

The facts surrounding the unlawful eavesdropping commenced on July 17, 1969 when the New York County District Attorney secured the first of a series of orders permitting his agents to intercept and record telephone conversations relating to alleged criminal activities by Charles "Ruby" Stein and Nicholas "Jiggs" Forlano. Neither of these persons nor their activities relate in any manner to the instant prosecution or to Grant.

On July 17, 1969, the initial warrant issued permitted the interception of communications over eight public telephones and the warrant restricted eavesdropping to conversations about Criminal Usury and con-

spiracy to commit that crime and prohibited the interception of unrelated conversations. (Emphasis added.)

On August 13, 1969, the original order was amended to include conversations relating to the Promotion of Gambling.

Subsequently the Stein warrant was again amended to intercept conversations relating to the crimes of forgery and stock fraud. The Government admits the Stein warrant was amended on September 18, 1969 to include conversations of Karp over the original eight public telephones pertaining to the crime of Criminal Usury. The Government further admits that the District Attorney's office sought and obtained two new orders on September 26, 1969 permitting the wiretapping of Karp's private telephones and the eavesdropping of certain communications in Karp's apartment relating to Criminal Usury.

The orders relating to the wiretaps are dated from July 12, 1969 to January 27, 1970.

At no time did the warrants encompass the offenses which became the subject of this prosecution nor was Grant mentioned as a party therein whose surveillance or privacy was violated nor was Grant given notice of the interceptions as required under New York C.P.L. 700.50(3).

The Government was given access to the tapes obtained through the surveillance by the office of the New York County District Attorney. There were some 3,000 hours of tapes.

The focus of the District Attorney's investigation was not Grant. Grant did, however, become exposed to the web of the State's surveillance and thus became the object of the Government's prosecution.

On several occasions, however, conversations between Grant and Karp relating to the Data offering were intercepted and recorded.

Petitioner Grant did not testify on his own behalf.

Co-defendant Alpert's trial was severed because he was scheduled to be tried in another case at the same time. Co-defendants Karp and Nasar pleaded guilty to counts 13 and 1, respectively, and testified for the Government at trial.

On October 17, 1969, Karp made a telephone call to Patterson which was recorded and admitted in evidence against Grant, over objection.

The Decision Below.

The Court of Appeals held that the wiretapping and bugging were legal and did not reach the question of whether the electronic surveillance tainted the indictment. Petitioner advanced five theories to support his claim that the wiretapping and bugging were unlawful under state law namely:

1. That the repeated extensions were impermissible;

2. That New York law does not permit eavesdropping in the investigation of the crimes charged in this case;

3. That the Government failed to notify Grant of the interception;

4. That State failed to name the Petitioners in the warrant; and

5. That there was no probable cause for the issuance of the warrant and extensions thereto in the first instance. The last three grounds were raised in a post-trial motion to acquit or, alternatively, to grant a new trial. The court below considered and rejected all of these contentions.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Raises Significant Issues as to the Constitutional Limitations on Wiretapping.

It is respectfully submitted that this case presents an inquiry not yet made available to this court into the nature and extent of electronic surveillance that involves the right of privacy and the right of a person to be secure against unlawful search and seizure within the protection of the Fourth and Fourteenth Amendment. This case presents the prosecution of an individual by the Government arising out of electronic surveillance conducted by State authority.

The wiretap evidence admitted against Petitioner below was the product of many months of eavesdropping, the granting of many extensions of the original eavesdropping orders and an illegal and unconstitutional application of Section 822 of the New York Code of Criminal Procedure.

This case presents the use of information against a person wholly outside the perimeter of the warrant, and information recorded and used at trial likewise outside the perimeter of the warrant and of the offenses under scrutiny.

This case presents important issues relating to the use of information obtained by wiretap and calls upon this court to determine whether or not such information is to be excluded. If such evidence cannot be used, then there will be less incentive to listen—and privacy

increased—unless the statutory limitation is strictly construed and the procedural requirements observed.

The court below suggested that Petitioner's attack on the warrant had not been made in a timely fashion which constituted a waiver of their objection to the indictment. Petitioner here contends that where a constitutional right affecting the fundamental fairness of trial was at stake, it will not be held to be "waived" absent a strong and compelling showing of intentional, informed waiver. *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408. The intrusion into one's privacy by electronic surveillance, within the protection of the Fourth Amendment, is such a right.

II.

Under New York Criminal Procedure Law Section 700 et seq., the Warrant Was Not Properly Issued and Extended for Several Months.

Petitioner contends that the extensions of the warrants were unlawful under New York Law. Section 821, (now N.Y.C.P.L. Section 700.40) of the New York Code of Criminal Procedure provides in relevant part:

> "At any time prior to the expiration of an eavesdropping warrant the applicant may apply to the issuing justice or if he is not available, to another justice, for an order of *extension*. The period of *extension* shall be no longer than the justice deems necessary to achieve the purpose for which it was granted and in no event for longer than 30 days . . ." (Emphasis added).

The extension contemplated in this section speaks in the singular and not in the multiple.

To the contrary Federal Law (18 U.S.C. Section 2518(5)) speaks of extensions in the plural wherein it provides:

> ". . . the period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted and in no event for longer than 30 days. . . . *extensions* of an order may be granted but only upon application for the extension made in accordance with (other provisions of this section) . . ." *Id.*

Accordingly it is suggested that where the State's statute speaks in the singular that it has the plurality of the Federal Statute in mind when it was enacted. This reasoning would be consistent with the Court's opinion in *Berger v. State of New York,* 388 U.S. 41 where the prior New York wiretap law was struck down because the statute placed no termination on the eavesdrop once the conversation sought is seized. The applications here for warrant do not make any showing of exigent circumstances and it is conceivable that the State could make repeated extensions of the warrant for the purpose of curiosity without limit. Where the right of privacy is such a fundamental liberty it would not be unreasonable to limit the State, under its own statute to one extension, thereby providing the State with 60 days to intrude upon the privacy of the individual or terminate this form of surveillance and employ other techniques less offensive.

III.

The Warrant Included Offenses Outside the Scope of This Prosecution and Was Invalid for Any Purpose as Against Grant.

Even if it is assumed that the Warrants in question were valid as to others, no use thereof could be made as against Grant. The original warrant authorized eavesdropping of conversations relating to criminal usury and were later extended to include conversation relating to the crimes of conspiracy and promoting gambling and grand larceny in an alleged scheme to erase a stock transaction. No authorization was ever requested or obtained for eavesdropping on conversations relating to the securities and mail fraud which is the subject of this prosecution. Moreover, no such authorization could ever be obtained because securities fraud, as charged, is not included in the offenses designated by Section 814(8) of the New York Code of Criminal Procedure.

Although the crime of grand larceny as defined in Section 155.30 *et seq.* of the New York Penal Code as an offense included in Section 814(8), the statutorily created offense of conspiracy to fraudulently sell or offer to sell securities through the means and instrumentalities of the United States mail or interstate commerce is not. The crimes of grand larceny under New York state law require proof of stealing of property. Securities fraud under both the 1933 and 1934 Securities Act requires no such showing.

In this regard it must be noted that the offense created by the State relating to manipulation of securities is similarly not grand larceny within the meaning of the penal law. Section 339-b of the General Business Law establishes a specific and separate crime

for manipulation of prices of securities which is punishable as a misdemeanor. Section 339.b is not one of the offenses included in Section 814(8).

Since the affidavit submitted by the District Attorney make it clear that they were not interested in stealing, but, rather, in stock manipulation, it must be assumed that inclusion of grand larceny in the order was a ruse by which they attempted to and succeeded in obtaining an unlawful warrant.

Despite the impropriety of the authorization, and the express prohibitions contained in the warrants, the Government intercepted several conversations in which Grant was either a party or in which his name was mentioned allegedly relating to the subject matter of this prosecution. Furthermore, even though the District Attorney admitted that Grant was not a target, and even though his conversations were recorded over bugged telephones, Grant was never informed of such facts as mandated by Section 822 (C.P.L. 700.50(3)). That Section provides in pertinent part:

> "Within a reasonable time, but in no case later than 90 days after termination of an extension order, except as otherwise provided in subdivision 4 of this Section, written notice of the fact and date of the issuance of the eavesdropping warrant and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other persons to the intercepted communication as the justice may determine in his discretion is in the interest of justice."

Accordingly Grant must be considered "such other person" as would be entitled to receive notice of the in-

terception, bearing in mind that the information was handed on a silver platter to the Government.

The Grant conversations were a direct result of unlawful eavesdropping warrants, outside the scope of the warrant, and because the Government failed to comply with the strict requirements of Section 700.50, such conversations must be considered the fruits of an unlawful search and seizure and in violation of the Fourth, Fifth and Fourteenth Amendments.

Here the Government obtained a pass key through the devise of repeated and extended warrants which did not include Grant nor encompass the subject matter of this prosecution. It would have been most easy to advise the justice when the warrants were issued, or extended, of the suspected Grant involvement in order that the order could be properly directed and the scope thereof reviewed with the protections contemplated by this court in *Berger v. State of New York*, 388 U.S. 41.

The applications for the warrant and the warrant itself did not apprise of the precise intrusion that would be entailed with respect to Grant, and no appropriate safeguards to his privacy were contemplated or formulated. The procedure employed here leaves too much to the discretion of the officer executing the order and is equivalent to a series of intrusions, searches, and seizures pursuant to a misleading showing and allows the interception of all persons coming into the area covered by the device. Indiscriminate use of electronic devices is permitted when the person outside the scope of the order later faces prosecution and suffers subtle jury reaction to the taped conversations adduced thereby.

IV.

The Prosecution Was Tainted in That Grant Was Not Named a Party Under the Initial Warrant nor on Any of the Amendments Extending the Initial Order.

The unnamed third persons, such as Grant here, fall under the gaze of the Orwellian ear without any protection of their privacy. It is this type of surveillance that the Court sought to denounce within its holdings in *Berger v. State of New York,* 388 U.S. 41 and *Katz v. U.S.,* 389 U.S. 347.

It is now well settled that the Fourth Amendment right to privacy has been declared enforceable against the States through the due process clause of the Fourteenth Amendment. *Berger v. State of New York,* 388 U.S. 41, 53.

Moreover Petitioner clearly has a standing to challenge the warrant and the statute regulating the same, as being indisputedly affected by it.

Merely because some persons were suspected of violating certain state laws does not enable the State to have a pass key to search either beyond the scope of the order and the information specified, or to intrude upon the privacy of others, and then deliver the information to the Government for prosecution.

In any event after the conversations pertained to Grant the order should have been amended to include him as a person entitled to notice, and moreover to determine whether or not the bugging was within the perimeter of crimes, involving Grant, which might be authorized under the New York statute. Here the state did not give the issuing Justice any information, to exercise his discretion regarding the scope and dimension

of the warrant, and whether or not the same should be extended, and, if so, what was necessary under the circumstances to protect an invasion of privacy. *Berger v. State of New York, supra; Osborn v. United States,* 385 U.S. 323.

As an acceptable alternative, it would not be unreasonable to require the state to describe with preciseness not only the nature of the information sought and its relevancy, but to include all who may be suspect in order that the Court can require such protection as the circumstances indicate. Unless the issuing court is kept fully advised each step of the way during the bugging voyage unauthorized invasions of privacy will be encouraged of the offensive character which this court would not tolerate in *Berger* and *Katz, supra.*

The issuing court cannot give any protection against invasions of privacy unless the person whose privacy will be invaded is identified. As with general warrants this leaves too much to the discretion of the officer executing the order and places no control on the prosecution to the detriment of one involved whether or not prosecution follows. The State continued to listen to conversations suspecting Grant, without amending the scope of the warrant or including him as a party covered thereby.

The recording should have been excluded either on constitutional grounds, *Weeks v. Uni'ed States,* 232 U.S. 383, or in the exercise of the court's supervisory power over the Federal Courts. *McNabb v. U.S.,* 318 U.S. 332.

V.

The Initial Warrant and the Extensions Thereto, Was Issued Without Compliance With New York Law and the Fourth Amendment and Were Without Probable Cause.

Neither the original authorization for the warrant nor the subsequent extensions and amendments were based on probable cause. *Berger v. New York, supra.*

Rather the affidavits in support of the warrants in this case were replete with suspicions, beliefs and conclusionary statements which this Court has repeatedly held are insufficient to permit the issuance of a warrant.

United States v. Ventresca, 380 U.S. 102 (1965);

Aguilar v. Texas, 378 U.S. 108 (1964);

Giordenallo v. United States, 357 U.S. 480 (1958);

Nathanson v. United States, 290 U.S. 41 (1933).

The affidavit of District Attorney Goldman in support of the first Stein affidavit concludes that Stein, Forlano, Alpirn and others "are engaged in a conspiracy to commit the crime of criminal usury". New York Penal Law Section 190-40 provides that a person is guilty of criminal usury when he "knowingly charges, takes or receives any money or other property as interest on a loan or for bearance of any money or other property, at a rate exceeding 25 percentum per annum or the equivalent ra'e for a longer or shorter period."

There is nothing in the application to support a finding of probable cause to believe that there was a con-

spiracy to charge, take or receive interest on a loan at a rate exceeding 25% per annum or to indicate the period of repayment or otherwise define the terms and conditions of the loan.

Therefore the eavesdropping warrant issued by Judge Lane was invalid, since there was no probable cause to believe that a particularly described person was committing a particularly designated offense as required by Section 816, N.Y. Code of Criminal Procedure, 18 U.S.C. Section 2518; *Berger v. New York, supra* 388 U.S. 41.

Further there was no probable cause to believe that the telephone numbers designated would be used in the furtherance of criminal usury or any other offense.

It would appear that the court was rubber stamping the District Attorney's applications for the initial warrant and the renewals thereto, without properly analyzing the nature of the facts set forth in the supporting affidavits or the sufficiency of such statements. Although *Berger* makes it clear that sufficient facts must be presented to the court to support a finding of probable cause before a warrant is renewed, no such facts were presented in the instant case.

If one must conclude that the court authorized extensions on the basis of the evidence submitted to the Court to obtain the original warrant, and upon the District Attorney's opinion that more time was needed to gather evidence, the court's holding in *Berger, supra* would show this is a patently unconstitutional procedure.

As such, all conversations obtained from the taps must be deemed the fruits of an illegal search and seizure and, accordingly, should have been suppressed.

All the defects pointed to by District Judge Joseph J. Lord 3d in ruling that title three of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*) is unconstitutional (*United States v. Whitaker,* CR 70-324 (June 1, 1972) (n.o.r.))—continuous searches over too long a period, excessive discretion in investigators, and failure to require prompt notification of all the subjects of the surveillance—exist in this case, and make an appropriate vehicle for exploration of the constitutional limitations upon wiretapping as authorized by the New York and Federal statutes.

Conclusion.

In that the offenses which Grant was prosecuted under are not included as offenses under New York state law, and in light of the repeated extensions of the initial warrant, and the failure of either the state or the Government to amend the warrants to include Grant as a subject thereunder, or to notify him of the surveillance as required by law, together with the lack of probable cause to issue the warrant in the first instance, requires a Writ Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

MARK HURWITZ,
Attorney for Petitioners.

Of Counsel:
HURWITZ & HURWITZ.

APPENDIX.

Opinion of the United States Court of Appeals for the Second Circuit.

No. 577—September Term, 1971.
(Argued March 9, 1972 Decided May 25, 1972.)
Docket No. 71-2198

UNITED STATES OF AMERICA,

Appellee,

vs.

M. PERRY GRANT and SERVICE SECURITIES, INC.,

Appellants.

Before:

FRIENDLY, *Chief Judge,* TIMBERS, *Circuit Judge,*
and JAMESON, *District Judge.**

Appeal from judgments of conviction after a jury trial in the District Court for the Southern District of New York, Lloyd F. MacMahon, *District Judge,* finding appellants guilty of violating the antifraud provisions of the federal securities laws, 15 U.S.C. §§77q(a), 77x, 78j(b) and 78ff (1970), of violating the mail fraud statute, 18 U.S.C. §1341 (1970), and of conspiring to violate the mail fraud statute and the antifraud provisions of the securities laws, 18 U.S.C. §371 (1970).

Affirmed.

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*Senior District Judge of the District of Montana, sitting by designation.

Jerome J. Londin, New York, N.Y. (Carro, Spanbock & Londin, Allen Green and Kenneth A. Lapatine, New York, N.Y., on the brief), *for Appellants.*

Franklin B. Velie, Asst. U.S. Atty., New York, N.Y. (Whitney North Seymour, Jr., U.S. Atty., Daniel J. Sullivan and Ross Sandler, Asst. U.S. Attys., New York, N.Y., on the brief), *for Appellee.*

Timbers, *Circuit Judge:*

Appellants M. Perry Grant and Service Securities, Inc. ("Service"), of which Grant is the 50% owner and president, were convicted after a nine day jury trial in the District Court for the Southern District of New York, Lloyd F. MacMahon, *District Judge,* of conspiring to violate and of violating the antifraud provisions of the federal securities law, 15 U.S.C. §§77q (a), 77x, 78j(b) and 78ff (1970), and the mail fraud statute, 18 U.S.C. §1341 (1970). On the five counts upon which they were convicted, the trial judge sentenced Grant to concurrent terms of imprisonment of six months on each count, and fined Service $1.00 on each count. On appeal, appellants contend that the indictment[1] was tainted by unlawful wiretapping; that a

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[1]The 23 count indictment was filed on June 29, 1971. Count 1 charged Grant, Service, Ronald Alpert, Leon Nasar and Charles Karp with conspiring to violate the antifraud provisions of the securities laws and the mail fraud statute in connection with the offer and sale of shares of stock of Data Industries Corporation of Texas, Inc. ("Data"). The 22 substantive counts charged each of the defendants with fraud in connection with the public offering and sale of Data stock in violation of the federal securities laws and the mail fraud statute.

Trial of appellants Grant and Service began on October 18, 1971. All counts except 1, 2, 3, 21 and 22 were withdrawn or

recording of a telephone conversation was improperly admitted against them; that the government's summation deprived them of a fair trial; and that the "free-rider" clause of the prospectus was not misleading. For the reasons stated below, we affirm.

I.

The evidence presented at trial established that Grant, operating through Service, a securities broker dealer, and in conjunction with J. L. Patterson, the president of Data Industries Corporation of Texas, Inc. ("Data"), and others, defrauded public investors in connection with an offering of a new issue of Data stock.

In December 1968, Data and Amos Treat and Com pany agreed that Treat would underwrite a public offering of Data shares. In the Spring of 1969, however, Treat announced that its own business reversals would prevent it from completing work on the offering. Patterson and the other backers of Data began looking for another underwriter.

In April 1969, defendant Nasar, a sharehold of Data who was one of Data's promoters, introduced Patterson to defendant Alpert, an employee of A. T. Brod & Co. Alpert in turn arranged for a meeting between Patterson and appellant Grant. Thereafter Grant and Service agreed to underwrite the Data offering.

An amendment to the registration statement naming Service Securities as underwriter was filed. The revised

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dismissed at the close of the government's case. On November 1, 1971, the jury found Grant and Service guilty on all five counts.

Ronald Alpert's trial was severed because he was scheduled to be tried in another case at the same time. Defendants Karp and Nasar pleaded guilty to Counts 13 and 1, respectively, and testified for the government at trial.

prospectus falsely represented Nasar as the sole finder and the finder's fee as $12,500 and a like number of warrants. Grant realized that the prospectus failed to disclose that Alpert was the true finder and that the finder's fee was to be $24,500 plus warrants, as Alpert was to receive $12,000 and a like number of warrants for his services.

The Data prospectus indicated that the offering of 150,000 shares for $8.50 per share was on a best-efforts-all-or-nothing basis. The registration statement became effective on August 18, 1969. Under the terms of the offering, if all 150,000 shares were not sold by October 17, 1969, sixty days after the effective date, all the money collected would be returned to the investors who had ordered shares.

The new issue of Data stock was not fully subscribed by September 1969. Moreover, outstanding orders were being cancelled daily. Grant and Patterson, a co-conspirator but not a defendant, recognized that drastic action was required to insure that the issue would be fully subscribed by the October 17 deadline.

In the first week of October, Grant devised a scheme for completing the sale of all 150,000 shares. The scheme was essentially as follows: friends and associates of Grant were induced to participate in the Data offering by Grant's guaranteeing them against loss. To make it appear as though all of the remaining shares had been purchased, Grant then would place orders in fictitious names or in the names of real person who did not intend to pay for the Data shares. The "successful" completion of the offering would permit public trading of Data shares in the over-the-counter market. Grant's nominees and friends would then sell their

shares in this "after-market". It would be Patterson's job to arrange sufficient buying in the after market so that the fictitious orders placed by Grant would be "crossed out"—offset by purchases in the after market —and not have to be paid for.

The success of Grant's scheme depended on carefully orchestrated buying and selling through a cooperating wholesale broker in the over-the-counter market. Patterson's buying in the after market would be placed, timed and priced to match Grant's selling of the Data shares which allegedly had been purchased during the public offering. The wholesale broker would match up or cross out the Grant sales with the purchases Patterson generated in the after market. The "sellers" thus would receive money to pay for the shares they had ordered. Moreover, by maintaining the market price above the offering price, subscribers to the offering would not cancel their orders, and additional persons might be induced to subscribe.

The payment for Patterson's buying in the after market was to be delayed by having the buyers request delivery of shares at their banks before payment would be authorized. Grant then promised that he would cross out Patterson's purchases by arranging for the sale of the shares to public investors.

To initiate this scheme, Grant caused a telegram to be sent on October 4, 1969 to members of the selling group, falsely declaring the issue fully subscribed.

On October 8, public trading in Data shares began. On October 9, Grant sent Patterson a list of the names of persons whose orders for shares in the underwriting were to be crossed out by Patterson's purchases in the after market. At Grant's daily direction, Patterson

caused his friends and associates to place orders for Data shares in the market at prices, times and with over-the-counter wholesale dealers designated by Grant.

On October 16, 1969, the closing of the offering was held, even though Grant and Patterson knew that not all of the 150,000 shares had been purchased and that not all of the proceeds had been received.

In the period following the closing, Patterson and his friends were not able to sell the Data shares purchased by them in the after market. As a result, some 50,000 shares of the 150,000 offered ended up in the hands of Patterson and his associates. Some of the purchases were ultimately financed by loans arranged by Patterson through Data.

II.

Appellants' first contention is that their convictions must be reversed on the ground that the indictment was the product of unlawful electronic surveillance. Since we hold that the wiretapping and "bugging" were legal, we do not reach the question of whether the electronic surveillance tainted the indictment.

The facts surrounding the allegedly unlawful eavesdropping are as follows. On July 17, 1969, the New York County District Attorney secured the first of a series of orders permitting his agents to intercept and record telephone conversations relating to alleged criminal activities by Charles "Ruby" Stein and Nicholas "Jiggs" Forlano. Neither of these persons nor their activities relate in any manner to the instant indictment or to Grant. The wiretapping continued for several months as authorized by court ordered extensions of the initial warrant. On September 26, 1969, as a result of information obtained from the Stein wiretap, the New York

County District Attorney secured an additional order to permit wiretapping of two telephones listed to Charles Karp, a co-defendant in the instant case. On October 19, 1969, New York Supreme Court Justice Schweitzer issued an order authorizing the interception and recording of oral communications in Karp's apartment. Upon a showing of probable cause, Justice Schweitzer renewed the eavesdropping warrants in October, November and December, 1969 and in January, 1970. Over this entire period a vast number of conversations between Karp and other persons were overheard and recorded. Virtually all of this material had no bearing on this case. On several occasions, however, conversations between Grant and Karp relating to the Data offering were intercepted and recorded.

Appellants advance five theories to support their claim that the wiretapping and "bugging" were unlawful under state law. Only two of these theories, however, were presented in a timely fashion to the district court. In a pre-trial motion to dismiss the indictment and suppress evidence, appellants contended that New York law does not authorize more than one extension of eavesdropping warrants and does not permit eavesdropping in the investigation of the crimes charged here.

The three remaining arguments upon which appellants rely to show the illegality of the electronic surveillance were raised for the first time after trial. In a post-trial motion to acquit or, alternatively, to grant a new trial, appellants claimed that the failure to notify Grant that his conversations had been intercepted made the eavesdropping unlawful. In their brief on appeal, appellants raised a fourth argument for illegality—the failure to name Grant and Service in the warrants. Finally, appellants argued for the first time in their

reply brief that there was no probable cause for the issuance of the Stein and Karp surveillance warrants.[2] Appellants' failure to make these three surveillance arguments in a timely fashion constitutes a waiver of their objection to the indictment based on these arguments. Fed. R. Crim. P. 12(b)(2). See *United States v. Garnes,* 258 F.2d 530, 534-35 (2 Cir. 1958), *cert. denied,* 359 U.S. 937 (1959); 1 Wright, Federal Practice and Procedure 406-07 (1969). In any event, we have considered these arguments and find them to be without merit.[3]

As for the two arguments pressed in the pre-trial motion, it is clear that they cannot carry the day for appellants. The suggestion that the extensions of the warrants were unlawful under New York law is frivolous. Section 821 (now N.Y. Crim. Pro. L §700.40)[4] of the New York Code of Criminal Procedure provides in relevant part:

> "Any time prior to the expiration of an eavesdropping warrant, the applicant may apply to the issuing justice, or if he is unavailable, to another justice, for an order of extension. The period of extension shall be no longer than the justice deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. . . ."

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[2]Grant's objection to the repeated renewals of the warrants did not effectively raise the issue of probable cause. Moreover, the statement in the post-trial motion affidavit that "[a]t no time did the prosecution furnish sufficient cause for interception of Grant's conversation. . . ." is too far off the mark from the issue of probable cause with respect to Karp and Stein.

[3]In addition to appellants' brief on appeal, reply brief and oral argument, we have considered the affidavit and memorandum of law submitted in support of their motion for leave to reargue the appeal, which we denied on April 4, 1972.

[4]Effective September 1, 1971, the sections of the New York Code of Criminal Procedure pertaining to eavesdropping were

Neither this section nor any other section of the eavesdropping statute limits the number of extensions which may be sought, as long as each extension is sought in the prescribed manner and does not exceed 30 days in length. Moreover, the present new York eavesdropping statute was enacted in 1969 with the intention that it conform to the federal statute, which had been enacted the previous year. *United States v. Poeta,* 455 F.2d 117, 119, n. 5 (2 Cir. 1972), slip op. 1515, 1518 n. 5 (January 24, 1972). The federal statute specifically states that "[e]xtensions of an order may be granted. . . ." 18 U.S.C. §2518(5) (1970). There is no reason to believe that the New York statute was intended to be any different in this respect.

Appellants' claim that the New York eavesdropping statute does not authorize surveillance in the investigation of the crimes charged here also is without merit. Section 815 (now N.Y. Crim. Pro. L. §700.10) of the New York Code of Criminal Procedure permits eavesdropping with respect to certain designated offenses. These are defined in §814(8) (now §700.5 (8)) to include conspiracy to commit any enumerated offense, and among the enumerated offenses are various degrees of larceny. The definition of "larceny" contained in §155.05(2) of the New York Penal Law is sufficiently broad to encompass the conduct involved in this case.

III.

We also reject appellants' contention that the district court erred in admitting against them a tape recording of a telephone conversation between Karp and Patterson.

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repealed and re-enacted without substantive change in sections 700 *et seq.* of the New York Criminal Procedure Law.

The evidence adduced at trial established that Karp authorized Grant to purchase shares for him in the underwriting at $8.50 per share, as long as Grant would guarantee to cross out his order by a purchase in the after market. While Grant never purchased shares for Karp in the offering, Grant did place in Karp's name an order for 2,000 Data shares at $11 per share in the after market. When Karp learned that 2,000 shares had been ordered in his name, he confronted Grant, who told him that Patterson had placed the order. On October 17, 1969, Karp made the telephone call to Patterson which was recorded and admitted in evidence against appellants. During the conversation, Karp and Patterson discussed ways of completing the 2,000 share transaction without upsetting the scheme and without imposing an unwanted liability on Karp.

In view of the purpose of the telephone conversation, the recording was properly admitted in evidence under the co-conspiracy exception to the hearsay rule. There was ample independent non-hearsay evidence to show that Patterson and Karp were conspirators with Grant in the scheme to defraud public investors. See *United States v. Calabro*, 449 F.2d 885, 889 (2 Cir. 1971); *United States v. Geaney*, 417 F.2d 1116, 1119 (2 Cir.), *cert. denied*, 397 U.S. 1028 (1969). Furthermore, it is clear that Karp's telephone call to Patterson was made in furtherance of the conspiracy. The purpose of the telephone call was to devise a means of disposing of the 2,000 shares which Grant had ordered in Karp's name. Thus, the telephone conversation comprised a series of statements by two co-conspirators in furtherance of the conspiracy.

It is quite true that not all of the statements made during the course of the lengthy telephone conversation could be said to have been in furtherance of the conspiracy. The trial judge did not err, however, in admitting all of the conversation, in spite of the well established rule that mere conversation between conspirators which is not in furtherance of the conspiracy is not admissible under the co-conspiracy exception to the hearsay rule. See *United States* v. *Birnbaum*, 337 F.2d 490, 495 (2 Cir. 1964); *United States v. Nardone*, 106 F.2d 41, 43 (2 Cir.), *rev'd on other grounds*, 308 U.S. 338 (1939). To exclude those statements which were not considered to be in furtherance of the conspiracy would have resulted in a disjointed conversation which might have confused the jury. Accordingly, since the telephone call itself was made in furtherance of the conspiracy, we believe the entire conversation was admissible under the principle of completeness. See *United States v. Agueci*, 310 F.2d 817, 834 (2 Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States v. Lev*, 276 F.2d 605, 608 (2 Cir.), *cert. denied*, 363 U.S. 812 (1960); *United States v. Corrigan*, 168 F.2d 641, 645 (2 Cir. 1948); Wigmore on Evidence §§2094, 2115 (3d ed. 1940).

At trial appellants' principal objection to the recording was that Karp's statement that he knew Grant had placed the 2,000 share order was inadmissible, as it contradicted Karp's trial testimony and the government could not impeach its own witness. The trial judge properly rejected this argument. Karp did not testify that he believed Patterson had placed the order. Rather, Karp testified that Grant told him that Patterson had placed the order. Thus, there was no inconsistency between Karp's trial testimony and his state-

ment to Patterson during the telephone conversation, and we need not consider whether appellants' argument would have merit if there had been.

IV.

Appellants also argue that the government's summation deprived them of a fair trial, claiming that the summation was based on an erroneous chart and that the prosecutor misrepresented the evidence adduced at trial.

A government chart purporting to show all trades in Data stock in the over-the-counter market in October 1969 was admitted in evidence at trial subject to revisions pursuant to agreement of counsel. The chart was a compilation of other documents and charts previously stipulated into evidence. The prosecutor referred to this chart several times during his summation. Thereafter defense counsel represented to the court that the chart had been changed beyond what was agreed to by counsel. Noting that any agreement about revising the chart had not been made on the record, the trial judge struck the exhibit and the prosecutor's comments relating to it. The court then instructed the jury to disregard the chart "on the ground that it contains too many errors." In support of a post-trial motion for judgment of acquittal, defense counsel filed a lengthy affidavit contending there were additional changes in the chart which he did not realize at trial.

After reviewing the record and the chart, we are convinced that appellants sustained no prejudice as a result of the chart's admission in evidence and the prosecutor's comments about it. The chart was not even inaccurate on the point emphasized by defense counsel. The proof established that Michael Brent, Grant's

decorator, "purchased" 2,000 Data shares in the offering at $8.50 per share and that Karp "purchased" 2,000 Data shares in the after market at $11 per share. The government showed that Grant was the moving force behind these transactions, that both Karp and Brent were in effect nominees for Grant, and that through these transactions Grant created a $4,153 profit for himself which he used to reduce his loan account at his bank. The chart reflected the sale of 2,000 shares at 10¾ to Austin, James & Co. from an account in the name of Michael Brent and the purchase of 2,000 Data shares at $11 per share from an account in the name of Charles Karp from Austin, James & Co. The chart also represented both trades as occurring on October 13, 1969. While there was some evidence that Karp's purchase occurred on the previous business day, this possibility was indicated in a footnote to the chart. In any event, the important fact was Grant's attempt to "cross out" the purchases by his nominees in the offering. That the trades reflected in the chart may have occurred on different days has little bearing on the government's case against appellants.

The other alleged inaccuracies in the chart are insignificant. Appellants have not even indicated how these alleged errors deprived them of a fair trial.

Appellants' contention that the prosecutor argued unfairly about Brent's signature on a letter likewise is without merit.

Michael Brent testified at trial that he acted as a nominee for Grant who bought and sold shares in his name. Brent sta'ed that he signed many documents at Grant's request, but was unable to recall the circumstances under which he had signed all of them. Brent further testified that Grant had opened an account for

him with Howard Dolman at Scheinman, Hochstin & Trotta.

After Brent had finished testifying, a letter signed by Brent ordering 2,000 Data shares was found in the government's files. Appellants neither recalled Brent for cross-examination nor requested that Brent be recalled by the government or the court. Rather, defense counsel introduced this letter in evidence through Virginia Diodata, a defense witness. Defense counsel then argued in summation that the initials at the bottom of the letter indicated that it had been prepared at Scheinman, Hochstin & Trotta, not by Grant, and that it was significant that Brent never mentioned this letter in his own testimony. In response, the government argued that if Brent were confronted with the letter, his answer would be that he could not remember the circumstances surrounding his signing that particular letter.

In view of Brent's testimony that he signed many documents at Grant's request under circumstances which he could not recall, tht prosecu'or's argument was fair comment on what inferences the jury might draw from the evidence. Moreover, the trial judge properly denied appellants' request to instruct the jury that Brent would have testified that Grant had nothing to do with the preparation of the letter. Appellants could have recalled Brent to question him about the letter. In light of their failure to do so, they were not entitled to a favorable instruction on what inferences the jury should draw from the letter signed by Brent.

Appellants' argument that the prosecutor's statement about Patterson's gun sales was unfair is equally unpersuasive. During cross-examination, Patterson admitted that he had sold eight pistols to a man from New York

who later told Patterson that he had used them once and disposed of them. There was no testimony as to when this sale occurred. Patterson also testified that he had agreed to cooperate with the government in the prosecution of this case. Defense counsel argued during summation that Patterson should not be believed because he sold guns to criminals. The government countered with the argument that "[y]ou don't know whether [the sale] happened before he was cooperating with the Government or after." While it subsequently appeared that only six of the eight pistols were bought and then sold by Patterson when he was cooperating with the government, there is no reason to believe that the prosecutor knew this fact at the time of summation. Accordingly, under the facts then known to him, the prosecutor's statement was fair comment on appropriate inferences to be drawn from the evidence.

Appellants also contend that the government engaged in unfair argument in stating to the jury that neither Karp nor Patterson were ever shown to have lied under oath. This claim is frivolous. Appellants' contention that Karp and Patterson lied to various people during the investigation is not supported by the record. Karp's and Patterson's testimony at trial was not inconsistent in any material respect from what they had said on previous occasions. Moreover, defense counsel had adequate opportunity during exhaustive cross-examination and summation to place before the jury what he considered to be prior inconsistent statements, thus fairly presenting the issue of credibility to the jury.

V.

Finally, appellants contend that the district court misconstrued the meaning of the "free-rider" clause of the Data prospectus.

The Clause in question reads in relevant part as follows:

> "An amount not to exceed 10,000 of the shares will be offered on the effective date at the public offering price to friends, employees and others having business relationships and personal relationships with the Company or its principal Stockholders, Directors or Officers. Persons to whom shares are so offered will be obliged to purchase such shares immediately upon this offering becoming effective and pay for them within 4 business days thereafter. . . ."

The government argued in summation that "friends, employees and others" had purchased more than 10,000 shares by the closing date of the offering and that the prospectus was therefore materially misleading in that the clause quoted above had represented that only 10,000 shares would be sold to such people. Over defense counsel's objection, the court instructed the jury that the government contended that the prospectus was misleading in that "it represents that no more than 10,000 shares of Data stock would be offered to friends, employees and others having to do with the company and its principal shareholders when, in fact, approximately 50,000 shares were sold to that class of persons."

It is clear that the district court misinterpreted that clause of the prospectus relating to sales of Data shares to friends, employees and others having a business relationship with Data and its officers. This provision was designed to limit the number of shares offered to friends of the company for only a twenty-four hour period beginning with the effective date of the offering.

The purpose of this type of provision is to satisfy the NASD and SEC bar against insiders purchasing all the shares of a "hot issue" before the public has a bona fide opportunity to subscribe. See 5 Loss, Securities Regulation 3455-61 (Supp. 1969). The clause in question should not have been interpreted to prevent subsequent purchases by friends and employees of the company if the issue was not fully subscribed after the first day of the offering. Accordingly, the court erred in instructing the jury that they should find the prospectus misleading if friends and employees of the company purchased more than 10,000 Data shares of the offering.

Nevertheless, as noted in Part I of this opinion, the government presented massive evidence showing that appellants had violated the mail fraud statute and the anti-fraud provisions of the federal securities laws. Thus, we hold that the court's misinterpretation of the "free-rider" clause of the prospectus constituted harmless error.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-131

M. PERRY GRANT AND SERVICE SECURITIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on four counts alleging violations of the antifraud provisions of the federal securities and mail fraud laws, 15 U.S.C. 77q(a), 77x, 78j(b), and 78ff, and 18 U.S.C. 1341, and one count of conspiracy to commit the substantive offenses, 18 U.S.C. 371. Petitioner Grant was sentenced to con-

current prison terms of six months; petitioner Service Securities, Inc. (Service) was fined one dollar on each count.[1] The court of appeals affirmed (Pet. App.).

The facts, which are not in dispute, are set forth in the opinion of the court of appeals (Pet. App. 3-7). The evidence established, in essence, that petitioner, operating through Service, a securities broker-dealer, and in conjunction with others, defrauded public investors in connection with an offering of a new issue of stock in Data Industries Corporation of Texas, Inc. The evidence relating to petitioner's claim that the indictment was tainted by illegal electronic surveillance showed that beginning in July 1969 various justices of the New York Supreme Court issued a series of orders authorizing agents of the New York County District Attorney to intercept and record certain telephone conversations of two persons not involved in this prosecution. In September 1969, on the basis of information obtained in one of the wiretaps, the court authorized a wiretap on the telephones of one Karp, and in October authorization was granted to intercept conversations in Karp's apartment. The eavesdropping authorization was renewed four times at 30-day intervals. Among the conversations intercepted and recorded were several between Karp and petitioner relating to the stock issuance. Pretrial motions to dismiss the indictment and to suppress the tapes as evidence were denied.

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[1] Subsequent references to "petitioner" refer to Grant.

The only issues raised by the petition, relating solely to the lawfulness of the electronic surveillance, are without merit. As the court of appeals noted (Pet. App. 7), only two of the contentions were timely raised before the district court. These were that New York law does not authorize more than one 30-day renewal of an eavesdropping warrant and that it does not permit eavesdropping to investigate the crimes with which petitioners were ultimately charged. With respect to these arguments, which are renewed here (Pet. 7-10), we rely upon the opinion below (Pet. App. 8-9).

The petition seeks to raise three further arguments: that petitioner should have been notified within 90 days after termination of the surveillance that his communications had been intercepted; that there was no probable cause to issue the surveillance warrants; and that petitioner should have been named in the warrants. The first two of these contentions were not timely presented to the district court, and the court below properly concluded that they had been waived. See Fed. R. Crim. P. 12(b)(2); *United States* v. *Garnes*, 258 F.2d 530, 534-535 (C.A. 2), certiorari denied, 359 U.S. 937. The third was expresssly disclaimed by petitioners in their brief to the court of appeals, and it need not be considered here.[2]

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[2] Petitioners' Reply Brief below stated (p. 29): "The Government's Brief sets up a straw man in arguing there was no requirement that Grant be named in the orders. Appellants make no such argument * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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